

1 Thomas R. Beer (148175), tbeer@barwol.com
Tino X. Do (221346), tdo@barwol.com
2 BARGER & WOLEN LLP
650 California Street, 9th Floor
3 San Francisco, California 94108-2713
Telephone: (415) 434-2800
4 Facsimile: (415) 434-2533

5 Attorneys for Defendant
GERLING AMERICA INSURANCE COMPANY
6

7 **UNITED STATES DISTRICT COURT**
8 **NORTHERN DISTRICT OF CALIFORNIA**
9

10 FIREMAN'S FUND INSURANCE)
COMPANY, a foreign corporation a/s/o)
11 BASIC RESOURCES, INC. and GEORGE)
REED, INC., a foreign corporation,)

12 Plaintiff,

13 vs.

14 GERLING AMERICA INSURANCE)
COMPANY, a foreign corporation,)
15

16 Defendant.
17

CASE NO.: 3:07-cv-06302-CRB

**DEFENDANT GERLING AMERICA
INSURANCE COMPANY'S OPPOSITION
TO PLAINTIFF'S MOTION FOR COURT
TO TAKE JUDICIAL NOTICE OF
UNDERLYING STATE COURT ACTION,
FOR FINAL SUMMARY JUDGMENT
AND FOR ALL OTHER PURPOSES
[F.R.E. 201]**

[No Hearing Requested]

18
19 Defendant Gerling America Insurance Company ("Gerling") submits this Opposition to
20 Plaintiff Fireman's Fund Insurance Company's ("FFIC") Motion for Court to Take Judicial Notice
21 of Underlying State Court Action, for Motions for Summary Judgment and for All Other Purposes
22 pursuant to Federal Rule of Evidence 201.

23 MEMORANDUM OF POINTS AND AUTHORITIES

24 **1. INTRODUCTION**

25 Gerling does not dispute the fact that the underlying Florida state court action occurred
26 between FFIC and Gerling's insured, Gencor Industries, Inc., or even the authenticity of the
27 documents from that state court action. However, Gerling must oppose this motion due to FFIC's
28

j:\office2\29218\011\08pleadings\gerling's opp to ffic's motion for judicial notice.doc

Defendant Gerling's Opposition to Plaintiff's Motion for Judicial Notice
3:07-cv-06302-CRB

1 disregard for proper procedure in filing this request as a “motion,” and the overly broad scope of
2 this motion with regard to the documents of which it seeks to obtain notice.

3
4 **2. ARGUMENT**

5 **A. FFIC’s Motion is Procedurally Improper**

6 FFIC fails to cite any legal authority to support the procedure in which FFIC moves the
7 Court to take judicial notice. Generally, a party files a “Request of Judicial Notice” directing the
8 court's attention to the material sought to be judicially noticed. This request is usually filed at the
9 same time as the motion in which it supports.

10 In this case, FFIC has filed this document as a “motion,” does not request a hearing and
11 states that these documents are meant to support FFIC’s future motion for summary judgment and
12 “for all other purposes.” This procedure is improper and compels the Court to deny FFIC’s motion.

13 **B. The Scope of FFIC’s Motion Is Overbroad**

14 FFIC is not merely requesting the Court to take notice of the fact of the underlying Florida
15 state court action, but is attempting to obtain judicial notice of a number of documents, including
16 the entire trial transcript, which is comprised of 8 volumes and totals 1,173 pages. Gerling does not
17 dispute the authenticity of the trial transcript, and will likely request the Court take judicial notice of
18 specific testimony from the transcripts. However, FFIC’s request for the Court to take judicial
19 notice of all 1,173 pages of the trial transcript is too broad as it essentially requests the Court to take
20 judicial notice of *all* the facts and events contained in the transcripts, in advance of FFIC’s motion
21 for summary judgment and “for all other purposes.” Given this overly broad and ambiguous
22 request, the Court should deny FFIC’s motion for judicial notice.
23
24
25
26
27
28

3. **CONCLUSION**

For the foregoing reasons, Gerling respectfully requests that the Court deny FFIC's motion for judicial notice.

Dated: June 27, 2008

BARGER & WOLEN LLP

By: /s/ Tino X. Do
THOMAS R. BEER
TINO X. DO
Attorneys for Defendant GERLING
AMERICA INSURANCE COMPANY